

VINCENT C. GRAY  
MAYOR

The Honorable Phil Mendelson  
Chairman, Council of the District of Columbia  
The John A. Wilson Building  
1350 Pennsylvania Avenue, NW, Suite 504  
Washington, DC 20004

Dear Chairman Mendelson:

I am vetoing Bill 19-1046, "Small and Certified Business Enterprise Development and Assistance Amendment Act of 2012." I want to be clear that I fully support and encourage reform of the Small and Certified Business Enterprise Program (Program). In fact, Bill 19-1046 includes many provisions found in the reform legislation I introduced last fall. And I appreciate that the Council's work here was well intentioned. However, it is critical that we get reform of this important Program right – and after reviewing the analysis of the enrolled version of the legislation by the Office of the Attorney General, the Department of Small and Local Business Development (DSLBD), and the Department of General Services, I have concluded that unfortunately the bill falls short of the mark. We also have heard from many people affected by this legislation who believe the bill, as crafted, is unworkable. I have outlined below some of the more salient concerns with the bill.

First, legal analysis of the legislation demonstrates ambiguous language and undefined terms that have the potential of placing the District at risk of litigation. To minimize such risk, the Executive originally proposed requiring DSLBD to go through the rulemaking process, which would have included Council approval, that would have defined many of these terms, as well as create a clear process for the bill's enforcement procedures. Unfortunately, many of the rulemaking provisions were rejected during consideration by the Committee on Small and Local Business Development.

Moreover numerous substantive changes to the legislation made during its final Council consideration at the December 18, 2012 Legislative Meeting (2<sup>nd</sup> Reading) resulted in Program requirements that are highly problematic. The most significant of which is a friendly amendment accepted at 2<sup>nd</sup> Reading that would increase the Certified Business Enterprise participation requirement from 35% to 50% and to expand the requirement from overall project cost to each individual component of construction, often referred to as "construction divisions." The first change is likely impossible to be met and the second change will result in significantly less competition. This is because Small Business Enterprise (SBE)/CBE capacity varies among

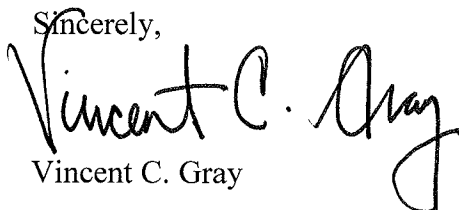
construction divisions. For example, there is more capacity in the drywall and carpentry subcontracting market than in the mechanical, electrical, and plumbing markets. With a small pool of businesses available to meet a new 50% SBE/CBE requirement in each construction divisions, significantly decreased competition will almost certainly increase cost and decrease quality on important civic projects.

Troublingly, the legislation seeks to cure such problems by increasing the use of waivers. The bill amends existing law to state that if there are not qualified SBEs, then work can be subcontracted to CBEs by removing the "Qualified" requirement. Without this requirement to identify qualified SBEs/CBEs, it is unlikely that the District can demonstrate that there is no SBE/CBE capacity in a construction division, which will induce contractors to subcontract with unqualified firms or seek SBEs that are serving as a front for qualified firms. This change would essentially negate the intended reform of the Program. In addition, if the market is lacking qualified businesses, to keep projects on track DSLBD would be forced to increase the number of CBE waivers. And even this remedy is flawed because the criteria for issuing waivers are not defined to the point to cure the stated challenges. Waivers are issued if there are no applicable businesses, but if the "Qualified" requirement is removed then it is unclear what rationale DSLBD will have to issue waivers in the first place. Moreover, if there is an increase in waivers issued by DSLBD, it will create a perception that CBE reform has failed due to the lack of work performed by qualified businesses. Needless to say, a regulatory scheme that requires frequent waivers raises serious concerns about the framework itself.

Finally, I am concerned that the bill adds significant new preference point categories. Since preference points are capped at 12, these new categories will erode the competitive advantage traditionally held by the CBE community. And because the new preference points are generally focused on hiring difficult to employ individuals and providing them benefits, rather than the size or disadvantaged status of the company, this will provide an opportunity for large businesses to eliminate the preference point gap between them and certain CBEs. Moreover, DSLBD does not have the capacity to ensure these new preference points are correctly and accurately applied by contractors and we have concerns with the bill's proposed self-certification mechanism. This provision is ripe for mischief and can lead to fraud. Diluting the preference point system potentially undermines the entire CBE program.

I fully appreciate the urgency to reform this vital and important Program in order to further its important goals while simultaneously preventing waste, fraud, and abuse. I look forward to working with the Council immediately, particularly the Committee on Business, Consumer and Regulatory Affairs, and all relevant stakeholders to develop reform legislation that everyone can support.

Sincerely,

A handwritten signature in black ink that reads "Vincent C. Gray". The signature is written in a cursive, flowing style. The first name "Vincent" is written in a larger, more prominent script, followed by "C." and "Gray".

Vincent C. Gray

Enclosures